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CITATIONS

614643—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 538

MONTGOMERY WARD & CO., INCORPORATED,
PETITIONER

v.

NATIONAL WAR LABOR BOARD ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 135–139) has not yet been reported.

JURISDICTION

The order of the District Court was entered on March 20, 1944 (R. 89–90).[1] The judgment of the

[1] After rehearing (R. 100–122), the District Court on June 21, 1944, affirmed its order of March 20, 1944 (R. 122–123).

Court of Appeals was entered on July 19, 1944 (R. 140). The petition for a writ of certiorari was filed on October 2, 1944. The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether a "directive order" of the National War Labor Board, issued subsequent to the War Labor Disputes Act and Executive Order 9370, may, in the circumstances of the present case, be enjoined or declared invalid in a proceeding brought in the federal courts.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the statute and regulations involved are set forth in Appendix, pp. 17–21.

STATEMENT

On October 5, 1943, the petitioner filed a complaint (R. 1–81), and on June 15, 1944, a supplemental complaint (R. 97–98), in the District Court of the United States for the District of Columbia, seeking (1) to enjoin the respondents from enforcing or compelling compliance by the petitioner with a "directive order" of the National War Labor Board issued on August 20, 1943, and (2) a declaratory judgment that such order is illegal and void (R. 17–18, 98). The complaint named as defendants the Board and, in their individual and

official capacities, its members, and the Director of Economic Stabilization (R. 2–3). Similar injunctive relief against "all other departments and agencies of the United States Government, whether named as defendants herein or not" (R. 18), was also prayed for.

The material allegations of the complaint may be summarized as follows: The petitioner is a corporation engaged in selling merchandise at retail through mail-order houses and retail stores (R. 3). At various times, all prior to December 14, 1942, labor disputes between the petitioner and its employees arose in the former's stores at Denver, Detroit, and Jamaica, N. Y. (R. 4–5).[2] No agreement was reached between the petitioner and the certified representatives of its employees (R. 4–5). Efforts of the Conciliation Service of the United States Department of Labor to settle the disputes were unsuccessful, and on December 7, 1942, the disputes were accordingly certified to the National War Labor Board (R. 49), pursuant to Executive Order No. 9017, under which the Board was established (see Appendix, pp. 18–20).[3] A hearing was held on January 14 and 15, 1943, before a panel designated by the Board to hear the disputes (R. 5), and on February 9, 1943, the

[2] It may be noted that the widely-publicized taking of possession by the Government of the petitioner's facilities in Chicago, Illinois, was in connection with orders of the Board not involved here in any respect.

[3] These facts are recited in Exhibit C annexed to the complaint (R. 49), and are not controverted.

panel made its report and recommendations to the Board (R. 6, 48–61), which, after the filing of objections by the petitioner (R. 6–7, 61–66), issued its order of August 20, 1943 (R. 7, 67–70). The order specified that certain provisions relating to "union security", seniority, and arbitration should be incorporated by the parties in a collective bargaining agreement (R. 67–69).

The complaint charged that the Board issued its order without a public hearing; that the order is not supported by substantial evidence or basic findings of fact; that it violates the War Labor Disputes Act; that it is "unfair and inequitable", "arbitrary and capricious", and "the result of bias and prejudice"; and that the petitioner was thereby deprived of liberty and property without due process of law (R. 7–13). It was further alleged that the petitioner has refused to obey the order, and that "the Board has reported, or is about to report and unless restrained by this Court, will report, such non-compliance to the Economic Stabilization Director"; that the "Director, under the terms of Executive Order No. 9370, is required to, is about to, and will, unless restrained by this Court, issue one or more of the directives specified in paragraphs (a) and (c) of said Executive Order, directed against the company" (R. 14); that the petitioner did not know "the exact nature of the directives" which the Director "proposes to and will" issue under that Executive Order "if not restrained", but that "any such

directive * * * would interfere with and destroy the operation of" the petitioner's business "and would result in irreparable injury" (R. 15).

The respondents moved to dismiss the complaint or, in the alternative, for summary judgment, on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (R. 84–85). In support of the motion the respondents filed two affidavits. The affidavit of Lloyd K. Garrison (formerly General Counsel and Executive Director, then an Alternate Public Member of the Board), stated that the Board neither threatened to take nor had taken action to enforce the order; that it had no power to enforce the order; and that it had not referred the matter of the petitioner's noncompliance either to the President or the Director of Economic Stabilization (R. 87). The affidavit of Fred M. Vinson, the Director of Economic Stabilization, stated that the petitioner's noncompliance with the Board's order had not been reported to him; that he neither threatened to take nor had taken action to effectuate compliance therewith; and that he was "not presently advised as to what action, if any, I would take pursuant to my discretion under Executive Order 9370 should the matter ever be reported to me" (R. 86).

The petitioner filed an affidavit that on January 18, 1944, at a hearing held before the Special Committee of the House of Representatives to

Investigate Executive Agencies, Mr. Garrison had stated, in response to a question as to what had "happened to" the petitioner as a result of noncompliance, "It is hard to give a simple answer because the question is colored by the pending litigation. * * * we have been hesitant, while those lawsuits are pending, to attempt to refer the cases to the President, or anything of that sort." (R. 88–89.)

The district court denied the respondents' motion to dismiss or for summary judgment (R. 89–90) and, after rehearing (R. 100–122), affirmed its order (R. 122–123). On appeal to the Court of Appeals (R. 123), the order of the district court was reversed on the ground that the complaint should have been dismissed and summary judgment for the respondents granted (R. 135–140).[4] The court below held that the War Labor Disputes Act does not make the Board's orders enforceable or reviewable; that the complaint does not state "a case

[4] By leave of the court below (R. 134), the petitioner furnished excerpts from testimony given in May 1944 by the Chairman of the Board and the Attorney General before a Select Committee of the House of Representatives (R. 128–134). These excerpts, consisting principally of discussion regarding the general authority of the President to deal with violations of orders of the Board, concern operations and labor disputes other than those here involved. They make no reference to the controversy giving rise to the Board's order here in question. In granting leave to file the excerpts, the court below noted that it had "duly considered them prior to the opinion in this case" (R. 134).

within the court's general equitable jurisdiction to review and restrain administrative action"; and that, in any event, "the uncontradicted affidavits" require summary judgment because they show "that there was no genuine issue as to any material fact" (R. 137–139).

ARGUMENT

While the question presented as to the reviewability of orders of the National War Labor Board is important, we believe the decision below is so clearly correct that further review is not warranted.

1. There is no statute or executive order purporting to authorize judicial review or enforcement of the Board's orders. Indeed, as was held in *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145, 147 (App. D. C.), certiorari denied October 9, 1944 No. 350, this Term, "the legislative history of the War Labor Disputes Act implies a positive intention that these orders should not be reviewed." Congress considered and rejected proposals to make the Board's orders enforceable and reviewable. In the Senate an amendment was offered to the bill, S. 796, to permit enforcement of the Board's decisions through suits by the Attorney General (89 Cong. Rec. 3898). This amendment was not adopted, but the bill, as passed by the Senate, contained a provision making Board decisions subject to court review

"on questions of law" (89 Cong. Rec. 3993–94). This provision was rejected by the House, as was a provision, added by the House Committee on Military Affairs, to authorize the Chairman of the Board to issue interim stay orders, enforceable judicially, for the "maintenance of the status quo." (Section 10, H. Rep. No. 440, 78th Cong., 1st sess.; 89 Cong. Rec. 5382–83.) In a letter to a member of the Conference Committee considering the bill, the Chairman of the War Labor Board opposed the adoption of any such provisions, on the ground that the Board's

> orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the no-strike, no-lock-out agreement and in conformance therewith to carry out the directives of the tribunal created under that agreement by the Commander in Chief.
>
> Since the bill does not, as we understand it, permit the Board to seek enforcement of its orders in the court, the Board's orders are to remain, as we think they should remain, without specific legal sanctions. This being the case, it would seem to us inconsistent to extend to losing parties the the privilege of delaying the outcome by taking the case into court for review.
>
> * * * we respectfully submit that for

> the duration of the war it would be in the best interests of the country to permit the War Labor Board to function as it has in the past 16 months, without the right to apply to the courts for legal sanctions and without being subject to court review of its decisions. (89 Cong. Rec. 5794–95.)

The Conference Committee, on consideration of this letter, omitted from the bill all provision for review or enforcement, and informed the Senate that the bill confers "no jurisdiction whatever" upon the United States district courts "over labor disputes" (89 Cong. Rec. 5754–5), because "the conferees * * * did not care to invite appeals to the courts, and delays" (89 Cong. Rec. 5791). The legislative history of the War Labor Disputes Act clearly shows, therefore, that Congress did not intend to subject the Board's orders to judicial scrutiny. Cf. *Stark* v. *Wickard,* 321 U. S. 288.

2. The crux of the petitioner's argument is that the federal courts may review the Board's order under their general equity powers (Pet. 17–27). We submit, however, that the court below correctly held that the complaint afforded no basis for the exercise of equitable jurisdiction to review the order.

The Board's order neither altered the legal rights of the parties nor imposed legal sanctions of any kind. Failure to comply with its directions did not subject the petitioner to enforcement proceedings or to penalties of any nature.

The present order, unlike that involved in the *Motor Freight Carriers* case, which recently came before this Court upon petition for certiorari, No. 350, this Term, was issued subsequent to Executive Order No. 9370, which authorizes the Director of Economic Stabilization, in cases in which the Board reports noncompliance with its orders, to direct other Government agencies to take "appropriate action relating to withholding or withdrawing from a noncomplying employer any priorities, benefits or privileges extended, or contracts entered into by executive action of the Government." But the respondents' uncontradicted affidavits show that the Board has not reported the petitioner's noncompliance to the President or to the Director of Economic Stabilization, and that the latter has neither taken nor threatened to take any action in this matter, either under Executive Order No. 9370 or otherwise (R. 86–87). As the court below observed (R. 138):

> Allegations that the Board is about to report plaintiff's noncompliance and that the Director is about to issue directives are not statements of fact at all but mere predictions. Little more can be said of the indiscriminate allegation that all the defendants threaten to enforce the Board's order. There are 22 defendants. The complaint does not state the form, substance, time, place, or circumstances of any threat. We must not ignore the prob-

> ability that if the complaint meant to allege threats it would say what form they took and when and to whom they were made. We understand the complaint to mean not that all 22 of the defendants, or any of them, have made threats, but that the plaintiff considers the situation threatening.[5]

Whether the petitioner's noncompliance with the Board's order will ever be referred to either the Director of Economic Stabilization or the President; whether, in such event, the Director would deem it necessary to take any action against the petitioner under Executive Order No. 9370; and whether the President would determine that furtherance of the war effort required that possession of the petitioner's facilities should be taken by the United States, are matters which at present are wholly conjectural. If the Board should report noncompliance to either the President or the Director, such report "would be

[5] The petitioner urges that its "allegations of imminent injurious action" in the complaint were sufficient to set up a ground for injunctive relief (Pet. 18–20), and entitled it "to an opportunity to prove the imminence of injurious action by evidence." This contention is plainly without merit. A mere forecast that "injurious action was intended or reasonably imminent" (Pet. 20) cannot constitute allegation of threatened action sufficiently imminent to support injunctive relief. The court below afforded the petitioner a reasonable opportunity to specify facts (as distinguished from undocumented conclusions) supporting its forecast; and the petitioner failed to supply or to indicate what facts could be proved at a hearing. In these circumstances dismissal of the complaint was clearly proper.

informatory and 'at most, advisory'" and not subject to review by the federal courts. *Employers Group etc.* v. *National War Labor Board,* 143 F. (2d) 145, 151 (App. D. C.); *National War Labor Board* v. *United States Gypsum Co.,* decided October 23, 1944, App. D. C., No. 8695; *Standard Computing Scale Co., Ltd.* v. *Farrell,* 249 U. S. 571, 574. And whether the Director or the President, who is not a party here, would take further action would depend upon independent determinations to be made by them.[6]

In these circumstances, the Board's order "does not of itself adversely affect complainant". Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130. It contains none of the incidents requisite for judicial review in the federal courts. *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145 (App. D. C.); *Baltimore Transit Co.* v. *Flynn,* 50 F. Supp. 382 (D. Md.); cf. *Pennsylvania R. R. Company* v. *Labor Board,* 261 U. S. 72; *Pennsylvania Federation* v. *Pennsyl-*

[6] If the President should order possession to be taken by the United States of the petitioner's stores, such action would be taken to prevent a break-down of services deemed essential in the interest of the war effort. The petitioner's fears of a possible exercise by the President of his seizure powers (R. 17–18, 98) would thus not be removed even if the order were enjoined or declared invalid. Furthermore, Executive Order No. 9370 does not require the Director of Economic Stabilization to act even if noncompliance is reported to him by the Board. He is "authorized and directed in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary" to achieve certain results. Thus this action, also, depends upon the exercise of an independent discretion.

vania R. R. Company, 267 U. S. 203; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299. Cf. *Watson* v. *Buck*, 313 U. S. 387, 399–400; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 237–238; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89.[7]

3. Even if the allegations as to threatened injury were adequate, we suggest that it would have been an abuse of discretion, in the circumstances of this case, to have granted injunctive relief. The Board's order, as an incident in the process of governmental conciliation of labor

[7] The cases cited by the petitioner (Pet. 8) as "probably in conflict" with the decision below do not support its argument. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, arose under the Railway Labor Act of 1926 (44 Stat. 577), and, as the court below found, "Both the legislative history of that Act and a number of expressions in the Act itself which are absent in the War Labor Disputes Act show an intent on the part of Congress to create legal rights" (R. 138). *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, was a suit to enjoin criminal prosecution under the Railway Labor Act for non-compliance with an administrative order. *Stark* v. *Wickard*, 321 U. S. 288, involved the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), which this Court found "bears on its face the intent to submit many questions arising under its administration to judicial review" (321 U. S. at 308), and which was accompanied by Congressional recognition of "the applicability of judicial review in this field" (321 U. S. at 309). *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, not cited by the petitioner, arose under special statutory provisions for judicial review, and involved immediate interference with contractual relationships.

disputes during the war, represented an effort to adjust by administrative action controversies threatening to disrupt functions essential to the prosecution of the war. The issuance of an injunction in these circumstances may have constituted an abuse of equitable discretion, whatever the scope of judicial review. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf. *The Hecht Co.* v. *Bowles*, 321 U. S. 321; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672. The holding of the court below that the district court should have dismissed the complaint is an appropriate acknowledgment of and deference to the national policy manifested in the War Labor Disputes Act not to subject the Board's orders to judicial enforcement or review. Cf. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 305.

4. The court below properly rejected the petitioner's contention that the complaint states a case for a declaratory judgment as to the validity of the Board's order. We have already shown that the petitioner was not entitled to equitable relief. By the same token, the complaint failed to establish any grounds for declaratory relief. There is

here presented no "substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Helco Products Co.* v. *McNutt,* 137 F. (2d) 681 (App. D. C.); *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325; *Smith* v. *American Asiatic Underwriters, Federal,* 127 F. (2d) 754, 756–757 (C. C. A. 9). The Declaratory Judgment Act does not open the federal courts to those who seek "to obtain an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443. See also *Employers Group, etc.* v. *National War Labor Board,* 143 F. (2d) 145 (App. D. C.); cf. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293.[8]

[8] In the district court the respondents also argued that the petitioner's suit is against the United States, even though it is not named as a formal party. Cf. *Louisiana* v. *McAdoo,* 234 U. S. 627; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 297. If this is so, the absence of congressional consent to the present suit deprives the courts of jurisdiction over the subject matter. *Oregon* v. *Hitchcock,* 202 U. S. 60, 69; *Minnesota* v. *Hitchcock, supra; Wells* v. *Roper,* 246 U. S. 335, 337; *Louisiana* v. *McAdoo, supra; Transcontinental & Western Air, Inc.* v. *Farley,* 71 F. (2d) 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Appalachian Electric Power Co.* v. *Smith,* 67 F. (2d) 451 (C. C. A. 4), certiorari denied, 291 U. S. 674. This point was specifically reserved in the court below.

CONCLUSION

While the question presented as to the reviewability of the Board's orders is important, we believe further review to be unnecessary in view of the clear correctness of the decision below, as well as the absence of any conflict of authorities. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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OCTOBER 1944.